

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JED MARGOLIN,

Plaintiff,

v.

NATIONAL AERONAUTICS AND SPACE
ADMINISTRATION,

Defendant.

3:09-CV-00421-LRH-VPC

ORDER

Before the court is Plaintiff's Motion for Costs (#64¹). Defendant filed an opposition (#65), and Plaintiff filed a reply (#66).

Plaintiff Jed Margolin, acting pro se, brought this action under the Freedom of Information Act ("FOIA") to compel the National Aeronautics and Space Administration ("NASA") to disclose withheld or redacted agency records related to an administrative claim of patent infringement filed by Margolin. His motion for costs follows this court's Order (#62) and Judgment (#63) of March 31, 2011, granting in part and denying in part the parties' cross-motions for summary judgment. Margolin now requests he be awarded costs of \$1,640.68.

FOIA authorizes the court to award "litigation costs reasonably incurred . . . in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E)(i). "[A] complainant has

¹Refers to the court's docket entry number.

1 substantially prevailed if the complainant has obtained relief through either--(I) a judicial order, or
2 an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in
3 position by the agency, if the complainant's claim is not insubstantial." *Id.* § 552(a)(4)(E)(ii).
4 Even if a plaintiff is eligible for a costs award, however, entitlement to costs is within the discretion
5 of the district court. *Long v. U.S. I.R.S.*, 932 F.2d 1309, 1313 (9th Cir. 1991). The court must
6 consider (1) the public benefit from disclosure, (2) any commercial benefit to the plaintiff resulting
7 from disclosure, (3) the nature of the plaintiff's interest in the disclosed records, and (4) whether
8 the government's withholding of the records had a reasonable basis in law, plus any other factors
9 the court deems relevant. *Id.*

10 To the extent Margolin seeks costs based on the court's summary judgment ruling, the court
11 finds that Margolin did not substantially prevail. The court upheld NASA's withholding of
12 virtually every document in dispute. As even Margolin concedes, he "basically lost this lawsuit."
13 Doc. #64, p. 3. The fact that the court ordered release of Index #252 (the "Calvert document") does
14 not alter this conclusion. The court granted summary judgment to Margolin as to that singular
15 document only because NASA had failed to submit any evidence explaining the document's
16 relevance and the basis for withholding, notwithstanding the court's suspicion that the document
17 was unresponsive to Margolin's FOIA request. Doc. #62, p. 16. As NASA's subsequent
18 submissions confirm, the Calvert document was in fact unresponsive to Margolin's FOIA request
19 and was included in NASA's index of withheld documents only because it was attached to an email
20 that the court held was properly withheld as privileged. *See* Doc. #65-1, pp. 2-3 (Decl. of Courtney
21 B. Graham). Thus, even though Margolin obtained an order partially in his favor, the relief he
22 obtained was nominal and had little relation to the relief he sought through this lawsuit—namely,
23 the disclosure of documents related to his administrative claim for patent infringement.

24 For substantially the same reasons, even if Margolin were eligible for an award of costs
25 based on the court's partial grant of summary judgment, the court would exercise its discretion to
26 deny costs to the extent they are sought on that basis. Although Margolin would not have any

1 commercial interest in the Calvert document, the court finds that disclosure of the document
2 provides little, if any, public benefit, the document was non-responsive to Margolin's FOIA request
3 and lawsuit, and in retrospect the government had a reasonable and legitimate basis for withholding
4 the document.

5 At the same time, the court finds that Margolin did substantially prevail to the extent that
6 the filing of this lawsuit prompted a voluntary or unilateral change in position by the agency.² 5
7 U.S.C. § 552(a)(4)(E)(ii). It was Margolin's filing of this lawsuit that prompted NASA to renew
8 and expand its search for documents responsive to Margolin's FOIA request, resulting in the
9 voluntary release of approximately 4,000 pages in NASA's supplemental response of November 5,
10 2009. *See* Doc. #62, pp. 4-5 (detailing the NASA's action before and after the filing of this
11 lawsuit). If not for Margolin's lawsuit, NASA would have rested upon its final decision denying
12 Margolin's administrative appeal of the agency's initial FOIA response. Margolin is therefore
13 eligible for a costs award under § 552(a)(4)(E)(ii)

14 The court further finds that Margolin is entitled to at least some portion of costs incurred
15 prior to November 5, 2009, when NASA made its supplemental disclosures. The public benefit
16 from disclosure may be small. Nonetheless, Margolin seems to have had little, if any, commercial
17 benefit resulting from disclosure, as he had already sold his interests in the patents at issue in his
18 administrative claim for patent infringement. Margolin's interest in obtaining information related
19 to his administrative claim for patent infringement was predominantly personal, and that interest
20 was substantial. Finally, NASA's initial withholding of the records it later voluntarily disclosed
21 was not based on any asserted reasonable basis in law. The withholding of the records later
22 voluntarily disclosed was due to a failure to conduct a thorough search for records responsive to
23 Margolin's FOIA request, not a conscious decision of the agency to withhold records under a FOIA
24

25 ²NASA makes no argument as to Margolin's eligibility for or entitlement to costs under a
26 catalyst theory. Instead, NASA argues only that Margolin is ineligible for and not entitled to costs
based on obtaining release of the Calvert document. *See* Doc. #65, pp. 2-3.

1 exemption.

2 The court also finds, however, that Margolin is not entitled to costs of litigation after
3 November 5, 2009, when NASA made its supplemental disclosures. As discussed above,
4 Margolin's continuation of litigation following that point was virtually fruitless, resulting in neither
5 additional voluntary disclosures nor the court-ordered disclosure of any documents responsive to
6 his FOIA request. Furthermore, the court finds Margolin's voluminous filings to have been in
7 substantial part immaterial to the FOIA issues before the court, unnecessarily voluminous even
8 when material, and therefore wasteful and unworthy of compensation.

9 To the extent Margolin is entitled to a portion of his costs, his itemization of costs incurred
10 is insufficiently detailed to permit the court to determine which costs were incurred prior to
11 November 5, 2009, and which were incurred thereafter. The court will therefore defer ruling on
12 Margolin's motion for costs pending submission of supplemental information.

13 IT IS THEREFORE ORDERED that within 14 days Margolin shall file an affidavit or
14 declaration itemizing litigation costs incurred prior to November 5, 2009. NASA may file
15 objections within 10 days thereafter.

16 IT IS SO ORDERED.

17 DATED this 31st day of May, 2011.



LARRY R. HICKS
UNITED STATES DISTRICT JUDGE